No. 383 4

SEP 4 1956

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

PREPO CORPORATION,

Petitioner,

vs.

PRESSURE CAN CORPORATION and WILLIAM B. HINN,

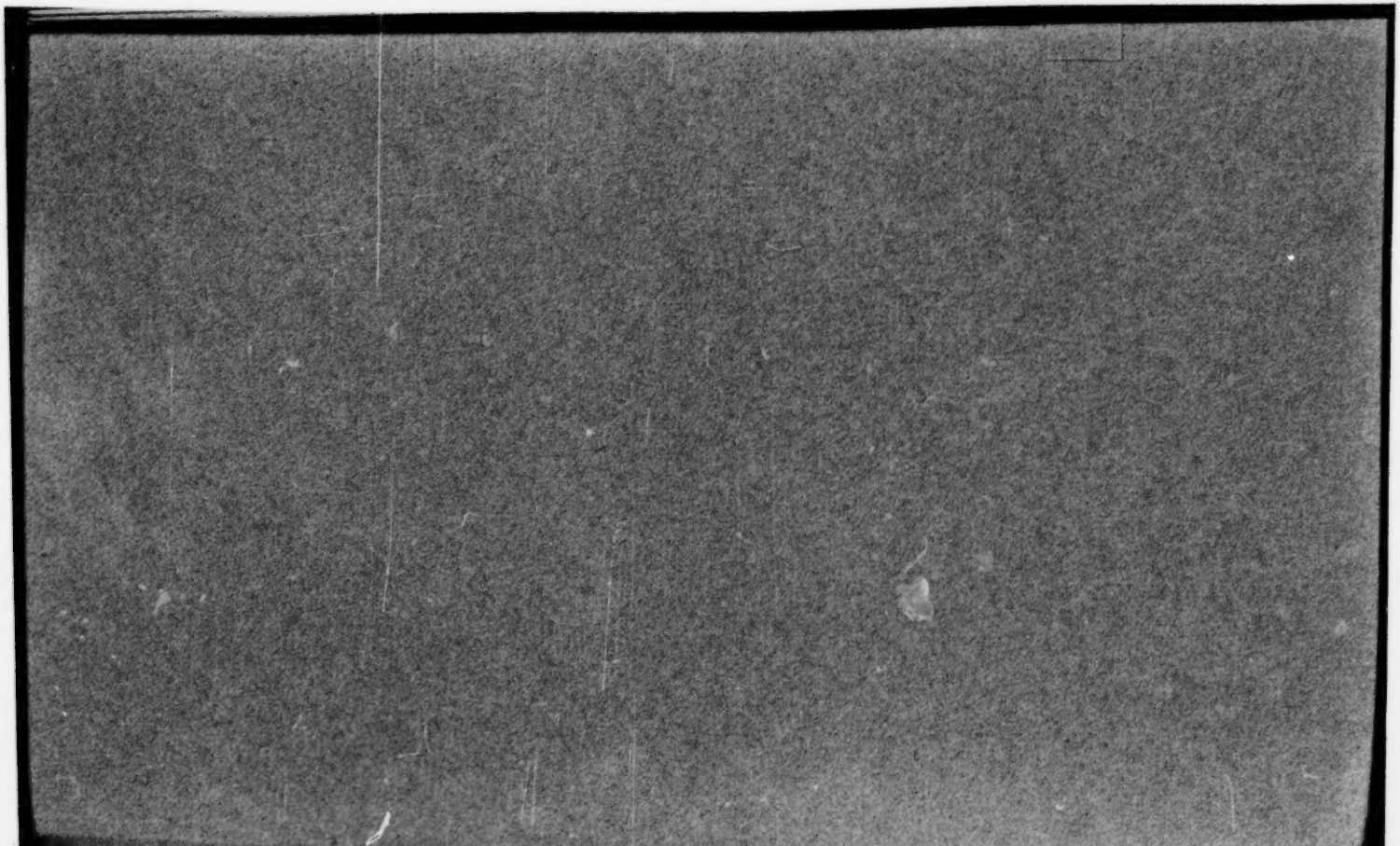
and

KNAPP-MONARCH COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Prepo Corporation, prays for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit, which reversed a judgment of the United States District Court for the Western District of Wisconsin holding Falligant patent No. 2,683,484 valid and infringed, and ordered the case remanded for further trial.

OPINIONS BELOW

A copy of the Opinion and Judgment of the Court of Appeals and of its Order denying plaintiff's petition for rehearing are hereunto annexed as Appendix A. The Opinion of the Court of Appeals is reported at —F.2d—, 110 U.S.P.Q. 108.

A copy of the Oral Opinion and the Judgment of the District Court are hereunto annexed as Appendix B. The Opinion of the District Court was not reported.

JURISDICTION

The judgment of the Court of Appeals was issued on June 27, 1956, and the petition for rehearing was denied on August 6, 1956. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. Code, Sec. 1254(1) authorizing review by this Court of judgments of the United States Courts of Appeal, upon petition for Writ of Certiorari, and 28 U. S. Code, Sec. 2101(c) stating the time of filing a petition for a writ of certiorari to be within 90 days of the date of the Judgment. The petition in this case is filed within the prescribed time.

QUESTIONS PRESENTED

1. Whether the Court of Appeals has disregarded clear and unequivocal admissions of infringement made by a party upon adverse examination and by stipulation of counsel at a pre-trial conference before the District Court and again in open Court, and ordered a further expensive trial of the issues thus admitted, upon the theory that the admissions were made solely for the purpose of a Motion for Summary Judgment brought several months after the date of the admissions.

2. Whether the Court of Appeals has disregarded clear and unequivocal representations made by counsel to the District Court in briefs and in open Court in response to questioning by the Court, and ordered a further expensive trial of the issues thus admitted, the representations and admissions being purely voluntary and not necessary for the purpose of the Motion for Summary Judgment before the Court.

3. Whether Rule 56 of the Federal Rules of Civil Procedure, following 28 U. S. Code, Sec. 2072, promulgated by this Court, requires or contemplates the admission by the movant for a Summary Judgment of any fact pleaded by the other party and not involved in the issue on the motion, particularly where no pleading is challenged by the motion as would be the case in a Motion for Judgment on the Pleadings under Rule 12(c).

4. Whether the Court of Appeals erred in reversing a Judgment of a District Court based upon clear and unequivocal admissions of record, and ordering an expensive trial of the issues thus previously resolved.

STATUTES AND RULES INVOLVED

The Statute involved is Title 28 U. S. Code, Sec. 2072 and Rule 56 (a), (b) and (c) of the Federal Rules of Civil Procedure for the United States District Courts, promulgated by this Court pursuant thereto. The Statute and Rule appear in Appendix C.

STATEMENT OF THE CASE

This is a Civil Action for patent infringement under Title 35 U. S. Code, Sec. 281. The action was commenced by filing a complaint on November 23, 1954 in the United States District Court for the Western District of Wisconsin (R. 3), which had jurisdiction under Title 28 U. S. Code, Sec. 1338(a) providing for original jurisdiction in District Courts of any civil action arising under the laws relating to patents.

Petitioner, Prepo Corporation, plaintiff below, is the owner of the Falligant patent No. 2,683,484 (R. 6-18) relating to portable appliances in the nature of blowtorches, camp stoves and lanterns which utilize a throw-away replaceable cartridge of self pressurizing fuel. Petitioner founded its business upon the patented appliances and had enjoyed a growth

in its business to an annual sales of over one million dollars prior to the entry by respondents into the market with the infringing devices (R. 196). The patentee, Louis A. Falligant, is the founder and President of petitioner (R. 206).

Respondent, Pressure Can Corporation, is the admitted infringer (R. 51-52, 266-284) and formerly was a contract loader of fuel cartridges for petitioner (R. 206, 245-246). It stopped loading for petitioner and began the infringing acts just prior to the issuance of the Falligant patent No. 2,683,484 and while the application therefor was pending.

Respondent, William B. Hinn, is the president of respondent, Pressure Can Corporation, and is its managing officer and personally directed all of the infringing acts and admitted the same upon adverse examination. (R. 244-245, 266-284).

Respondent, Knapp-Monarch Company, is the successor to Pressure Can Corporation of the infringing business (R. 67-72), having purchased the same pending this suit and intervened under order of the District Court, copy of which is annexed hereto as Appendix D.

Knapp-Monarch Company is a large manufacturer of various home appliances and up until the injunction in this case it continued its predecessor's marketing policy of selling the infringing devices at prices that failed to net it a profit thereon and which during the pendency of this law suit tended to destroy petitioner's market for the patented devices (R. 207-209).

A pre-trial conference was had before the District Court at which a signed stipulation of infringement was filed with respect to the blowtorch (R. 51-52). In adverse examination of respondent, William B. Hinn (R. 266-284), the similarities of construction and mode of operation of all three of respondents' devices, the blowtorch, camp stove and lantern, and

all facts necessary for a holding of infringement by all three were fully admitted.

Respondents, after adverse examination of Louis A. Falligant, the patentee (R. 133-134), brought a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, 28 U. S. Code, Sec. 2072, alleging an intervening public right under the doctrine set forth by this Court in *Muncie Gear Works, Inc.*, vs. *Outboard Marine & Mfg. Co.*, 315 U. S. 759, 62 S. Ct. 865, (R. 130-132). After briefs and a full hearing in the District Court upon this motion, the Court denied the motion, and in reliance upon the previous admissions of respondents with respect to infringement and upon additional representations and admissions made by counsel for respondents in briefs and in response to questioning by the Court that "There is no genuine issue of fact with respect to validity," rendered judgment for plaintiff upon its own motion. The opinion and judgment of the District Court appear annexed in Appendix B.

The District Court had held five different hearings on different phases of the case and was fully informed as to the facts and the need of expediting the disposition of the case in preventing an injustice to the patentee from the non-profitable operations of the respondents.

Upon appeal to the Court of Appeals, respondents waived all question of the merits and did not again raise the question of invalidity of the patent under the Muncie Gear doctrine or question the District Court's denial of its Motion for Summary Judgment. The only issue raised on the appeal was that of the effect of respondents' admissions in the District Court.

The Court of Appeals on June 27, 1956, reversed the District Court and ordered the case to be remanded for further proceedings in accord with its opinion. The opinion of the Court of Appeals appears annexed in Appendix A.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

1. The Court of Appeals in rendering its decision and ordering a remand for further trial of the case, has placed an extraordinary burden upon this petitioner which will in effect destroy any possibility of its benefiting from the patent even though the patent be held valid and enforced after trial. Unless the Petition be granted and the District Court be affirmed, respondents will be free to continue their non-profitable infringement of the patent and which has already irreparably damaged petitioner's sole business under the patent (R. 196-223) to the extent that it has no adequate funds with which to afford a further trial and the usual appellate procedures thereafter.

The extensive depositions and numerous Court Hearings before the District Court in this case have fully resolved the issues before the District Court and eliminated the necessity for further expensive procedure. The case had very thorough consideration in the District Court and its Judgment was rendered to expedite the disposition of the case in the interest of justice.

The issue of infringement had been fully resolved by admissions and a signed stipulation obtained at substantial expense through adverse examinations, and such admissions were on file long prior to the Motion for Summary Judgment and could not have been solely for the purpose of the motion. If the Judgment of the Court of Appeals requires that such issues be re-tried, an unjustified burden of expense and inconvenience will be placed upon petitioner and which it can ill afford.

2. The Court of Appeals has decided an important question of federal law relative to the Federal Rules of Civil

Procedure promulgated by this Court, and which has not been, but should be settled by this Court in the public interest.

This case is important in establishing the meaning of Rule 56 (F. R. C. P.) with respect to whether or not a party bringing a motion for summary judgment can make positive admissions disposing of all fact issues, and then after a decision rendered against it, hide behind the doctrine of admitting only for the purpose of the motion as though challenging the pleading under Rule 12(c), or whether such admissions which are not necessary for the particular motion under Rule 56 may be considered by the District Court as a representation of fact upon which it is entitled to act.

The importance of this question is emphasized by the seeming confusion of the Court of Appeals between motions under Rule 12(c) and motions under Rule 56, in applying its own case of *M. Snower & Company* vs. *United States* (C.A.7-1944) 140 F. 2d 367, to this case.

In the *M. Snower* case the contention was made by the party moving for summary judgment that because the opposing party had counter moved for judgment on the pleadings, the admissions necessarily accompany a challenging of the sufficiency of the pleadings were binding and supported the trial court's granting of the motion for summary judgment. The Court of Appeals in that case properly refused to recognize the binding effect of implied admissions as to the truth of pleaded allegations and held that the admissions were only for the purpose of the motion which challenged the sufficiency of the pleading under Rule 12(c) and could not be used in support of a different motion against the admitting party. In that case there were no express admissions.

In the present case the original motion for summary judg-

ment was brought upon uncontroverted facts relating to a single pleaded issue. That motion was denied and the District Court then acted upon its own motion to award judgment based upon the express admissions of respondents which had been made to it concerning the absence of other issues.

The Court of Appeals in its decision ignores: (1) the fact that the admissions here were not limited to the issue upon the motion but were broad to the entire case; (2) the fact that no pleading was challenged here and therefore there was no necessity for any admission waiving other issues; and (3) the fact that the admissions here were expressly made to the Court and were not in the nature of implied admissions.

As to the first point, it is sufficient to quote the admissions and to note that they went far beyond the motion issue and purported to resolve the issues in the entire cause of action:

> ". . . (1) there is no genuine issue as to any material fact with respect to said First Cause Of Action, which relates to the patent in suit . . ." (R. 130)
>
> * * * * * *
>
> "There is no genuine issue as to the material facts with respect to the first cause of action involving Claims 7-13 of patent 2,683,484." (R. 242-243)
>
> * * * * * *
>
> "There is no genuine issue as to any material fact in this case." (R. 243)
>
> * * * * * *
>
> "The Court: Do you contend there is no genuine issue of fact?
>
> "Mr. Lettvin: There is no genuine issue of fact with respect to validity." (R. 165).

None of the above admissions were at all qualified as being

only for the purpose of the motion, as the Court of Appeals in this case erroneously states on page 5 of its decision (Appendix A, page 6a).

As to the second point, the original motion for summary judgment was based solely upon a single pleaded issue, and did not depend upon the presence or absence of other issues. Any admissions as to the other issues were wholly outside the purview and scope of the motion and could not be for the purpose of the motion.

As to the third point, the express nature of the admissions as repeated and consistent representations to the District Court clearly justified its reliance thereon. There were no implied admissions necessary on the motion, and therefore, the admissions here under consideration were voluntary and truly of a nature to be relied upon by the Court and by petitioner.

The admissions of respondents herein would have resolved the issues and warranted the judgment of the District Court had they been made solely at a pre-trial conference or under Rule 36. They can be no less potent where voluntarily made at any other time in the course of a case, and unless required as an implied admission in challenging a pleading when moving to dismiss under Rule 12(c), they must be given full force and effect.

3. The Court of Appeals has rendered a decision here in direct conflict with its former decision in *Tripp et al* vs. *May* (C. A. 7-1951) 189 F. 2d 198, wherein the Court affirmed the grant of a Summary Judgment upon oral motion without notice against a party moving for Summary Judgment, where at the Hearing an admission was made by counsel in open court. In the present case, the repeated express admissions of counsel and the added admission in open court as above quoted, were broader and more binding than was the single open court admission in *Tripp* vs. *May*.

4. The Court of Appeals has rendered a decision here in conflict with the right of the District Court as stated by this Court in *Fountain* vs. *Filson*, 336 U. S. 681; 69 S. Ct. 754, to order a summary judgment in favor of one party after the opposite party has moved for summary judgment in its favor, "where it appears that there is no dispute as to any fact material to the issue being litigated." The admissions in this case clearly resolved any dispute of fact material to the issue being litigated and the District Court was entirely justified in rendering summary judgment against respondents herein.

The District Court, in explaining its decision at a later Hearing, quoted the following from the presently pending Proposed Amendments to the Rules of Civil Procedure, as to Rule 56:

> "Summary judgment may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party." (R. 213)

The above states the general practice under Rule 56, and which was followed by the District Court in this case. The Court of Appeals has ignored this practice.

CONCLUSION

Having shown the extraordinary burden placed upon petitioner; the importance of the question involved under the Rules promulgated by this Court; the intra-circuit conflict between the Court of Appeals and the District Court, and the Court of Appeals and its own prior decision in *Tripp* v. *May;* and the possible conflict with the decision of this Court in *Fountain* v. *Filson;* petitioner respectfully urges that the present petition be granted and that this Court summarily order a reversal of the Court of Appeals and an affirmance of the District Court.

Respectfully submitted,

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Milwaukee 2, Wisconsin,
Attorney for Petitioner.

APPENDIX A

(OPINION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DECIDED JUNE 27, 1956)

Before DUFFY, *Chief Judge*, FINNEGAN and LINDLEY, *Circuit Judges.*

LINDLEY, *Circuit Judge.* Plaintiff, owner of patent to Falligant, 2,683,484, issued July 13, 1954, originally brought suit in the district court against the defendant Pressure Can Corporation for infringement and unfair competition. Later it joined as defendant the corporation's president, William B. Hinn. Knapp-Monarch Company, having purchased certain assets of Pressure in June 1955, on July 8, 1955, was permitted to intervene and become a party defendant as to the questions raised as to validity and infringement. The cause finally came to issue upon the second amended complaint and the answers thereto. No questions other than those arising upon the first count charging infringement are involved on this appeal.

On October 25, 1955, Knapp-Monarch filed a motion for summary judgment, arguing that the patent was invalid in view of the provisions of R. S. 4886, U. S. C. Title 35, § 102 (b), as interpreted by the United States Supreme Court in *Muncie Gear Works, Inc.* v. *Outboard Marine & Mfg. Co.*, 315 U. S. 759. The court denied the motion, in which apparently Pressure concurred, and entered final judgment in favor of plaintiff against defendants, adjudging the patent valid and infringed, and ordering an accounting, treble damages and attorney's fees. From that judgment separate appeals have been perfected. The ultimate

question submitted is whether the district court was justified in entering summary judgment in plaintiff's favor.

Under Rule 56 of the Federal Rules of Civil Procedure, 28 U. S. C. A., a summary judgment may be entered if it appears that no genuine issue of material fact exists and the question raised is one of law upon undisputed facts. Defendant's motion averred that there was no genuine issue as to any material fact with respect to invalidity of the patent on the ground urged and that defendant was entitled to judgment of invalidity and non-infringement as a matter of law. This admission the district court evidently thought was a waiver of all defenses of invalidity as well as of any question of infringement, giving the court authority, under the rule, to treat the case as though all questions of fact theretofore presented had been removed from the case, and proceeded to enter final judgment, as at trial, in favor of plaintiff and against defendant declaring the patent valid and infringed.

We think the court labored under a misapprehension of the scope and proper interpretation of Rule 56. In *Snower & Company* v. *United States*, 140 F. 2d 367, at 369, we had occasion to consider a similar situation. There we said that plaintiff "argues that there is no issue of fact because the defendant, by making a motion for judgment on the pleadings, has admitted the untruth of its denial of plaintiff's allegation * * *. when a party moves for judgment on the pleadings, he not only, for the purposes of his motion, admits the truth of all the allegations of his adversary, but must also be deemed to have admitted the untruth of all of his own allegations which have been denied by his adversary. But [the cases] make it clear that such 'admission' is only for the purpose of the motion. In other words, such 'admission' is not final, binding, and conclusive in such a way as to amount to a definitive waiver of material

facts put in issue by the answer. Instead, the trial may proceed, and the factual issues raised by the answer are then subject to proof. Thus if the court denies a party's motion for judgment on the pleadings, this does not mean that he is precluded from contending that his denials (in his answer) of the allegations in plaintiff's complaint are true." Later, the United States Court of Appeals for the Sixth Circuit, in *Begnaud* v. *White*, 170 F. 2d 323, agreed, saying at 327: "The fact that both parties make motions for summary judgment, and each contends in support of his respective motion that no genuine issue of fact exists, does not require the Court to rule that no fact issue exists. Each, in support of his own motion, may be willing to concede certain contentions of his opponent, which concession, however, is only for the purpose of the pending motion. If the motion is overruled, the concession is no longer effective. *Appellants' concession that no genuine issue of fact existed was made in support of its own motion for summary judgment.* We do not think that the concession continues over into the Court's separate consideration of appellee's motion for summary judgment in his behalf after appellants' motion was overruled. *M. Snower & Co.* v. *United States*, 7 Cir., 140 F. 2d 367, 369." (Emphasis supplied.)

Under these authorities defendant's admission that there was no genuine issue of material fact involved in its motion for summary judgment admitted, for the purpose of the motion, that, upon the issue presented by the motion, no question of fact existed. Defendant, in support of its motion, raised the one question of whether the file wrappers of certain patents disclosed such defects in the prosecution and allowance of the patent in suit as had been held fatal by the Supreme Court in the *Muncie Gear* case. Under that motion, if the court so construed the file wrapper history

as to violate the teaching of Muncie, there being no dispute as to the facts involved, but only those disclosed in the file wrappers, it would have been perfectly justified in concluding that upon this, the sole issue presented, there was no genuine issue of fact and could have properly proceeded to a finding of invalidity. In other words, the issue presented was whether, as a matter of law, the patent was invalid upon the narrow ground urged.

The court should not have proceeded further and disposed of all other issues raised in the case, unless the record discloses some justification for such action, either by stipulation or by admission. Plaintiff asserts that the record contains such stipulations and admissions as conferred upon the court the power to dispose of the whole case. In that respect, it relies upon the following facts. The motion asserted that there was no genuine issue of material fact. The parties stipulated that the patent, if valid, was infringed by defendant in the manufacture and sale of a portable blow-torch. Counsel for defendant stated that the admission of infringement went only to the blow-torch and not to the other accused structures and that he had good reason to believe the patent invalid as not representing invention over the prior art. Defendant Knapp-Monarch entered its appearance to join in the defense of non-validity and non-infringement. Its answer, as well as that of Pressure, set up various prior art references in support of invalidity. The attorney admitted infringement "for the purpose of the motion" but added that he denied infringement "if he had to go to trial." He expressly stated that the defense asserted by the motion was "not the only defense defendant has submitted," and that he was contending further "that the patent is invalid in view of the prior art." Knapp-Monarch, upon entering its appearance, had stated that it

thought it could go along with the proposition that there had been infringement to the extent Pressure had stipulated, provided the patent was held valid.

These and similar facts of no wider import than those recited are said to be sufficient evidence of admissions by defendant that it was waiving all issues of fact presented by its answer upon validity, thus justifying the court in entering final judgment. We have searched the record in vain for support for plaintiff's contention. As we have pointed out, the admission of fact, so far as validity was concerned, was limited to the specific legal defense presented upon certain undisputed facts. There was no attempt to dispose of, no waiver of the right to have determined, the question of whether the patent had been anticipated by the prior art or whether the status of that art was such as to make of the achievements of the patentee only the ordinary accomplishment of a skilled mechanic in the trade. Those defenses, under the rule announced in Snower, remained undetermined and unwaived, to be disposed of by the court upon evidence bearing thereon, if the motion for summary judgment was overruled.

Plaintiff insists that this case is controlled by *Tripp* v. *May*, 189 F. 2d 198 (CA-7). There defendant had made a motion for summary judgment and plaintiff a cross-motion for similar relief in its favor. The court denied defendant's motion and allowed that of plaintiff. But there we found no disputed question of fact remaining in the case. We said (at 199-200): "the court and the parties at that time treated it as final and as presenting everything which could be presented in the determination of the issues of the cause. * * * it should be kept in mind that a party moving for summary judgment concedes the absence of a factual issue only for the purpose of his motion." We added as a further rea-

son for approving the entry of judgment, that the attorney for the defendant had said in open court, "We can't offer anything further on the trial of the case. There is not any dispute as to the facts." In that situation, we held that the trial court was justified in entering summary judgment and disposing of the entire cause. We think the present case is clearly distinguishable. Though defendant's counsel did say that there was "no genuine issue of fact with respect to validity," he added the qualifying statement, "for the purposes of this motion."

We are not confronted with any contention that the court erred in overruling defendant's motion for summary judgment. The only issue presented is whether the court was justified in proceeding further and in entering judgment for plaintiff on the merits, in the absence of any evidence or stipulation waiving or otherwise disposing of other defenses preserved by the answers of defendants. Inasmuch as we believe the court was not so justified, the judgment is reversed and remanded for further proceedings in accord with the announcements herein contained.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

(PER CURIAM ORDER OF THE COURT OF APPEALS OF THE SEVENTH CIRCUIT FILED AUGUST 6, 1956, DENYING PETITION FOR REHEARING)

It is ordered by the Court that the petition for a rehearing in the above entitled causes be, and the same is hereby, DENIED.

APPENDIX B

(ORAL OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN DATED MARCH 7, 1956)

DECISION OF THE COURT

The Court: I have already pointed out how the facts in the Muncie Gear Company case differ from the case now pending before this Court.

The Muncie Gear Company case was decided upon the failure of disclosure in the original application; and any subsequent disclosure was necessarily new matter. Not so in this case. There is no new matter in the present instance. The same device is still the subject of the claim.

I like the law as laid down in the case of *Helms Products, Inc.* v. *Lake Shore Manufacturing Co.*, 227 F. 2d, 677, decided on December 1, 1955, by the Seventh Circuit Court of Appeals in which Judge Swaim used this language:

"The defendant also acuses the plaintiff of inserting new matter in the application by amending the application by the insertion of a more detailed description of the manner in which the picture is mounted in the frame.

"The plaintiff admits that the insertion of new matter is contrary to a strict rule of the Patent Office which states that any changes made after the application is filed must correspond to either the drawings or the specifications as filed. The purpose of the rule is to enforce the requirements of 35 U. S. C. A., section 132, which provides that: '* * * No amendment shall introduce new matter into the disclosure

of the invention.' The plaintiff insists, however, as shown above, that the changes made in the application for its patent not only correspond to the drawings but also correspond to a feature of the invention as defined in Claim 6 of the original application.

"The fact that the Patent Office granted the patent in suit necessarily means that it did not consider the amendments to the application as 'new matter' within the meaning of its rules or of the Act. Since the Patent Office is constantly determining and defining what is or what is not new matter, its ruling on such questions is entitled to special weight."

And then he cites certain cases.

"Amendments to specifications for the purpose of clarity and definiteness are permissible. We think the amendments made in the instant case were of that type. We certainly cannot say that the action of the District Court approving the determination of the Patent Office was clearly erroneous."

And I will go along with that. I think the amendments made in the instant case were similar to what was already before the Patent Office. The amendment did not introduce any new matter; it just clarified the original application.

All the equities in this case are on the side of the plaintiff. There certainly isn't any question about that, in my opinion. When the defendant deliberately makes a Chinese copy of plaintiff's product and puts it on the market, it infringed plaintiff's patent. It has admitted infringement of plaintiff's patent.

Section 282 of the Patent statutes reads:

"A patent shall be presumed to be valid, and the burden of establishing invalidity of a patent shall rest on the party asserting it."

The Court finds that the plaintiff's patent is valid. The defendants' motion is denied, and the plaintiff may have judg-

ment according to the prayer of its complaint. There is no need of burdening the plaintiff with a long and expensive lawsuit that may consume a great deal of time and money that I presume plaintiff can ill afford to spend.

(JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN, DATED MARCH 7, 1956)

JUDGMENT

The defendants having filed a motion for summary judgment upon the First Cause of Action, and the same having come on for hearing before this Court, this 7th day of March, 1956, and after full hearing thereon it is ordered that said motion be denied.

It further appearing that defendants having represented to the Court that "There is no genuine issue as to any material fact in this case," and the Court finding that all equities herein are with the plaintiff, that the defendants having admitted infringement of the patent if valid, that the Falligant Patent No. 2,683,484 granted July 15, 1954, is valid; that Prepo Corporation, plaintiff herein, is the owner of said patent; that the infringement by defendants has been deliberate and with full knowledge of plaintiff's rights; and on the Court's motion, for the purpose of expediting this case, it is hereby adjudged and decreed:

1. That Claims 7 to 13, inclusive, of the Falligant Patent No. 2,683,484, are valid, and infringed by defendants' manufacture and marketing of a blowtorch, stove, and lantern, and of fuel cartridges therefor;

2. That a permanent injunction issue immediately out of this Court against Pressure Can Corporation, William B. Hinn, and Knapp-Monarch Company, the defendants herein, and each of them, enjoining them from further acts of infringement of the Falligant Patent No. 2,683,484, and from making, using, or selling the invention of said patent through-

out the United States; said injunction to be binding upon their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of this order;

3. That Plaintiff may have an award of damages for said infringement, and that an accounting be had to determine the same; and that said damages when assessed be increased to three times the amount so assessed as provided by statute;

4. That plaintiff be awarded costs and reasonable attorneys' fees.

Plaintiff having withdrawn the second cause of action, it is hereby ordered that the same be and is hereby dismissed.

It appearing that no counterclaim was filed by defendants in their answer to the Second Amended Complaint, the counter claim theretofore filed by defendants is hereby dismissed.

ENTER:

PATRICK T. STONE (s)
District Judge.

March 7, 1956

APPENDIX C

Title 28 U. S. Code, Section 2072. Rules of Civil Procedure for District Courts

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States and of the District Court for the Territory of Alaska in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. As amended May 24, 1949, c. 139, Sec. 103, Stat. 104; July 18, 1949, c, 343, Sec. 2, 63 Stat. 446; May 10, 1950, c. 174, Sec 2, 64 Stat. 158.

Rule 56 (a), (b) and (c), FEDERAL RULES OF CIVIL PROCEDURE

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, eff. March 19, 1948.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, eff. March 19, 1948.

APPENDIX D

(ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN DATED JULY 12, 1955)

ORDER VACATING PRELIMINARY INJUNCTION

The defendants having made a motion upon due notice to plaintiff to vacate the Preliminary injunction, and the same having come on for hearing at 2:00 o'clock P. M. on July 8, 1955, and Knapp-Monarch Company being present by counsel at the hearing and requesting permission to intervene as a party defendant in the patent cause of action only;

IT IS HEREBY ORDERED: That said Knapp Monarch Company be entered as a party defendant under the patent cause of action only, subject to all admissions and stipulations of defendant, Pressure Can Corporation appearing to date in the proceedings of the case, including those in adverse examination of defendant's officers.

IT IS FURTHER ORDERED: That the Preliminary injunction ordered by this Court on June 27, 1955, be and the same hereby is vacated.

It is further found that the Preliminary Injunction was properly issued and having been vacated, the bonds of plaintiff in support of the temporary restraining order in the amount of $500.00 and of the Preliminary Injunction in the amount of $5,000.00 are hereby released.

/s/ PATRICK T. STONE,
United States District Judge.

July 12th, 1955

FILED
OCT 1 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 383

PREPO CORPORATION,

Petitioner,

vs.

PRESSURE CAN CORPORATION AND WILLIAM B. HINN,

AND

KNAPP-MONARCH COMPANY,

Respondents.

BRIEF FOR RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI.

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THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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BRIEF FOR RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents, Pressure Can Corporation and William B. Hinn, and Knapp-Monarch Company, submit this brief in opposition to the Petition for the Writ of Certiorari.

Respondents assert that the petition presents no ground which justifies the writ.

QUESTION PRESENTED.

Petitioner sets forth four questions upon which review is sought and which, in effect, can be simply summed up as follows:

When a motion for summary judgment is brought on a narrow issue of law involving only one of a number of pleaded defenses, does denial of the motion preclude the defendant from trial thereafter of the other properly pleaded defenses?

Respondents aver that the answer to this question is clearly "No".

SUMMARY STATEMENT OF THE CASE.

Petitioner, owner of Falligant patent No. 2,683,484, brought suit against respondent, Pressure Can Corporation, for alleged infringement of the patent and unfair competition, later joining Pressure Can Corporation's president, William B. Hinn, as a defendant. Knapp-Monarch Company subsequently intervened only as to the cause of action involving the patent.

Petitioner's amended complaint, upon which the cause came to issue, alleged validity and infringement of the Falligant patent. In their Answers, respondents denied validity and infringement and set forth a number of grounds of invalidity. A substantial number of prior art patents were affirmatively pleaded by respondents.

Respondent, Knapp-Monarch, filed a Motion for Summary Judgment predicated on only one of the grounds of invalidity pleaded. In accordance with customary procedure, the other pleaded defenses were conceded to be absent only for the purpose of the Motion.

Thus, during oral argument in support of the Motion for Summary Judgment, counsel for Knapp-Monarch stated (R. 165):

> "Mr. Lettvin: Your Honor, for the purpose of the motion as in any motion for summary judgment, those elements which are not pleaded in the motion for summary judgment, must be taken as admitted to be true. And, therefore, we start with the fact—
>
> "The Court: Do you contend there is no genuine issue of fact?
>
> "Mr. Lettvin: There is no genuine issue of fact with respect to validity.
>
> "The Court: Then you admit infringement.

"Mr. Lettvin: For the purpose of this motion, yes, sir.

"The Court: Yes.

"Mr. Lettvin: For the purpose of this motion.

"The Court: All right.

"Mr. Lettvin: But we deny infringement if we have to go to trial. And we think we can prove that."

Upon denial of the Motion for Summary Judgment, counsel for Knapp-Monarch reminded the Court (R. 187):

"Mr. Lettvin: This is not the only defense that defendant has submitted. We contend that the patent is invalid in view of prior art."

Manifestly, pleaded defenses not involved in the Motion were clearly preserved for trial in the event the Motion for Summary Judgment was denied.

The District Court denied respondent Knapp-Monarch's Motion for Summary Judgment and, without any motion by petitioner and on the Court's own motion, rendered summary judgment against respondents, finding the Falligant patent valid and infringed, and in addition awarded an immediate injunction, triple damages and attorney's fees, all without benefit of trial on the issues raised by the pleadings.

Upon respondent's appeal from the Judgment of the District Court, the Court of Appeals held that the District Court erred in denying respondents the benefit of trial in the absence of any evidence or stipulation waiving or otherwise disposing of the other defenses preserved by the Answers of respondents, and remanded the case for trial of the pleaded issues in accordance with its Opinion. (App. A of Petition, p. 1a.)

ARGUMENT FOR DENYING THE PETITION FOR WRIT OF CERTIORARI.

The issue in the present case is narrow and uncomplicated. Further, it is one upon which the governing law has been repeatedly and unequivocally expressed by the courts. Consequently, there can be no valid grounds which would warrant review of the present case by this Court on certiorari.

I.

The Decision of the Court of Appeals Is Clearly Correct.

To reverse the Court of Appeals' decision would: (1) deny the Defendants any right to a trial of contested pleaded issues, the evidence respecting which has never been submitted to the District Court; and (2) in effect, attach the imprimatur of this Court to a summary decision of a District Court in which a patent was found to be valid without the benefit of a trial.

The public, as well as respondents, is entitled to a full inquiry as to the validity of the patent in suit, and hence the proceeding to trial respecting that issue can hardly be challenged by petitioner. As this Court has observed in *Sinclair & Carroll Co.* v. *Interchemical Corp.* (Sup. Ct.—1945), 325 U. S. 327, at page 330, the question of validity of a patent is of great public importance. This Court further stated in that case that the lower court "• • • followed what will usually be the better practice by inquiring fully into the validity of this patent." Accordingly, there does not exist any basis for granting the Petition which has the ultimate purpose of depriving respondents

and the public of the right to a full and open inquiry into the validity of the patent in suit.

Petitioner insists that respondent Knapp-Monarch's admissions in moving for summary judgment upon only one of the pleaded defenses, namely, that the Falligant patent was invalid under the doctrine laid down by this Court in *Muncie Gear Works, Inc.* v. *Outboard Marine & Mfg. Co.* (Sup. Ct.—1942), 315 U. S. 759, constituted a waiver of all of the factual issues raised by the answer, including those issues not involved in the Motion. This position is clearly contrary to the law and contrary to the facts contained in the record.

It is fundamental that a party moving for summary judgment concedes the absence of factual issues only for the purpose of his motion. Thus, when a number of defenses have been pleaded in a lawsuit and the defendant moves for summary judgment upon the narrow ground of only a single one of the pleaded defenses, a court upon denial of defendant's motion may not award judgment to the plaintiff without affording the defendant an opportunity to present its proofs as to the other defenses at issue.

Fountain v. *Filson, et al.* (Sup. Ct.—1949), 336 U. S. 681, 683.

Tripp v. *May, et al.* (C. C. A. 7—1951), 189 F. 2d 198, 200.

Begnaud v. *White* (C. C. A. 6—1948), 170 F. 2d 323, 327.

M. Snower & Company v. *United States* (C. C. A. 7—1944), 140 F. 2d 367, 369.

In support of the allegation that admissions by respondent Knapp-Monarch, in furtherance of its Motion for Summary Judgment, waived all the other properly pleaded defenses, petitioner has quoted (Petition, p. 8) selected

portions of the record. An examination of the entire record clearly shows that the quoted statements of respondent were made either as part of the Motion, in the briefs in support of the Motion, or during oral argument on the Motion.

Petitioner has failed to show any legal reason why respondent should be deprived of the right of trial merely because it filed a Motion for Summary Judgment as to one pleaded defense.

Further, petitioner has failed completely to show any waiver by respondents of their pleaded defenses that the Falligant patent is invalid in view of the prior art. Public importance attaching to the validity of a patent is also of interest. The Court of Appeals has correctly decided that the pleaded issues should not be determined without the benefit of trial.

Petitioner speaks of the "extraordinary burden" which the Court of Appeals has placed upon him in remanding the cause for trial. Obviously, there is no burden greater or more extraordinary than the burden suffered by respondents in being denied the right to trial.

II.

There Is No Conflict of Decision.

There is no unsettled question in this case involving the Rules of Civil Procedure promulgated by this Court. While *M. Snower & Co.* v. *United States*, 7 Cir., 140 F. 2d 367, involved a Motion under Rule 12c, the case of *Begnaud* v. *White*, 6 Cir., 170 F. 2d 323, involved a Motion for Summary Judgment under Rule 56. In its Opinion herein, the Court of Appeals of the Seventh Circuit relied upon both of those cases. The Court of Appeals of the Sixth Circuit, in its decision in *Begnaud* v. *White*, relied upon *M.*

Snower v. *United States.* Thus, both the Sixth and Seventh Circuits have interpreted the Federal Rules in the same manner in situations like the one involved herein. There is no conflict in this area.

The second point asserted by Petitioner involves an alleged conflict between the District Court in this case and the Court of Appeals in this case. This is not the type of conflict which serves as a valid basis for granting a Petition for Writ of Certiorari. The Circuit Court of Appeals has properly corrected the District Court on a question of law, and has remanded the case to the District Court to proceed with the trial of the pleaded issues. There is no Federal question involved under this set of facts.

Petitioner alleges that the decision of the Court of Appeals is in direct conflict with its former decision in *Tripp* v. *May, et al.* (C. C. A. 7—1951), 189 F. 2d 198. However, in comparing *Tripp* v. *May* with the present case, the Court of Appeals stated, "We think the present case is clearly distinguishable." (App. A of Petition, p. 6a) Since the Court of Appeals has distinguished between *Tripp* v. *May* and the present case, there is no conflict. It is further observed that in *Tripp* v. *May* the defendants admitted that their Motion for Summary Judgment involved the only pleaded issue in the case and that there was nothing further to offer at a trial. In the instant case, respondent's Motion for Summary Judgment involved only one of the number of issues raised in the pleadings, which issues were clearly preserved by the Motion.

The last point asserted by Petitioner is an alleged possible conflict of the Circuit Court's decision with this Court's decision in *Fountain* v. *Filson* (Sup. Ct.—1949), 336 U. S. 681. It first is noted that *Fountain* v. *Filson* did not involve the important public question of validity of a

patent, as is here involved. Further, in *Fountain* v. *Filson,* this Court refused to approve of a lower court's deciding, without trial, other than the issue involved in a Motion for Summary Judgment that had been brought by the Defendant. In the instant case, the Court of Appeals has likewise refused to approve a decision of a lower court deciding, without trial, issues not involved in a Motion for Summary Judgment that was brought by respondents. Not only is there no conflict between those two decisions, but in fact they are on all fours with each other.

III.

There Is No Important Question of Federal Law.

After a searching examination of the Petition, respondents have been unable to find any important questions of federal law which require decision by this Court. The decision of the Court of Appeals in remanding this case to the District Court for a trial upon the issues raised in the pleadings was in accord with the principles of due process and with the cases of *Fountain* v. *Filson, et al., M. Snower & Company* v. *United States,* and *Begnaud* v. *White.* A correct decision in a narrow and simple case grounded on well-settled principles of law does not require the further consideration of this Court.

Conclusion.

No ground is presented justifying granting the Petition for the Writ of Certiorari, wherefore said Petition should be denied.

Respectfully submitted,

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and

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Respondents.

REPLY BRIEF FOR PETITIONER

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Respondents.

REPLY BRIEF FOR PETITIONER

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner points out the following errors in the Brief for Respondents:

I

THE QUESTION

The reframed question on page 2 of Respondents' brief is not the issue.

It is not the denial of the motion for summary judgment that precludes the further trial of the case. The admissions of defendants (Respondents) made both before the motion

and during its consideration and which had nothing to do with the motion, resolved the issues and made it the duty of the court to render judgment in expediting the disposition of the case.

The admissions as to infringement were by depositions, by written stipulation and by counsel in open court long before the bringing of the motion for summary judgment. The admissions as to validity (quoted at page 8 of the Petition) were voluntary and were not necessary for or related to the motion for summary judgment.

A confessed criminal needs no trial. Similarly, a confessed trespasser needs no trial.

II

IT IS NOT "CUSTOMARY" TO CONCEDE PLEADINGS WHICH ARE NOT CHALLENGED BY MOTION

The alleged "customary procedure" of conceding the absence of other pleaded defenses referred to on page 3 of Respondents' Brief is applicable only to motions under Rule 12 (c) and not to motions under Rule 56. Under Rule 56 there is no challenging of the pleadings and no need to concede the truth of the complaint or the absence of any defense.

The quotation from the oral argument beginning on page 3 of Respondents' Brief does not support Respondents' position. There was no qualification or reservation of the issue of validity. As to the attempted reservation of the issue of infringement the court noted later in the same hearing that Respondents had previously stipulated and admitted infringement.

III

RESPONDENTS' BELATED ATTEMPT TO RE-INSERT CONCEDED ISSUES AFTER JUDGMENT

The statement on page 4 of Respondents' Brief to the effect that "Upon denial of the Motion for Summary Judgment" counsel for Respondents reminded the court that there were other defenses, (quoting from R. 187) is misleading. That statement occurred, not "upon denial of the motion," *but after pronouncement of Judgment!*

IV

PUBLIC INTEREST IS WITH THE PATENTEE NOT WITH CONFESSED INFRINGERS

The so called public interest in the validity of a patent, asserted on page 5 of Respondents' Brief, does not prevent the effectiveness of Respondents' admissions. This is a civil action in personam, not an action in rem.

The public interest is that expressed in the Constitution and is to protect the small individual inventor who starts a new business and brings a product to the public market. Certainly such public interest does not support a larger corporation, and admitted infringer, in under pricing a chinese copy of the patentee's product and destroying the market for the patentee. In this instance Petitioner was founded solely upon the patented device as the Constitution declares should be encouraged, and has now been reduced to a penniless state by the ruthless machinations of Respondents who the district court called "vultures" (R. 213, 223).

The district court stated (R. 215):

> "I have never seen a more flagrant or a more bold attempt to steal the property of another man, the patentee, than I have in this case. You read the affidavit of Falligant, and if it doesn't impress you — and I am shedding no crocodile tears for the infringers in this case. They were deliberate — they were brazen — they were bold — they were dishonest. That is the way I feel about this."

The public should have no interest in "vultures" and equity is not for a party who attempts "to steal the property of another man, the patentee . . ."

V

THE ADMISSIONS DID NOT ARISE OUT OF THE MOTION FOR SUMMARY JUDGMENT

The argument on page 6 of Respondents' Brief overlooks the fact that there are no implied admissions arising from a motion for summary judgment, as would be the case under Rule 12(c) where a pleading is challenged by motion, and Petitioner therefor does not rely upon any admissions arising out of the motion for summary judgment, as now contended by Respondents. The admissions here were all deliberate and express, and were not in any sense a result of the motion.

VI

RESPONDENTS' MISLEADING CHARACTERIZATION OF FOUNTAIN v. FILSON

On page 9 of the Respondents' Brief an attempt is made to mislead this Court into believing that its holding in

Fountain v. *Filson* (Sup. Ct.-1949), 336 U. S. 681, refused a district court's right to grant judgment against one bringing a motion for summary judgment. The holding in that case applied only to a court of appeals and this court expressly denied ruling upon the right of a district court to do what it there denied to the court of appeals. See statement and quotation on page 10 of Petition.

CONCLUSION

This case is a shining example of a large corporation harrassing a small inventor and destroying Petitioner's sole business under the patent to such an extent that Petitioner is without adequate funds to carry on (R. 223).

The district court had justice in mind when he termed the Respondents "vultures."

Justice does not always require a trial. No court would insist upon wasting the public's funds and the court's time to try a criminal who has confessed the crime. So, courts should not insist upon wasting the funds of a small inventor and the trial court's time to try civil issues already confessed.

Justice in this case requires that this court now summarily reverse the court of appeals and order that the Judgment of the District Court be affirmed.

Respectfully submitted,

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